[2020] **JMSC Civ 52**

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2018HCV04595

BETWEEN	**ASHFORD ADOLPHUS FLEMMINGS**	**CLAIMANT**
AND	**PAULINE GRIZZLE MCDOVE**	**DEFENDANT**

IN CHAMBERS

Mr. Ruel Woolcock instructed by Ruel Woolcock and Company for the Claimant

Mr. Fabian Campbell and Ms. T instructed by Kingston Legal Aid Clinic Limited for the Defendant

Heard: February 25 and March 6, 2020

The Property Rights of Spouses Act - Application for declaration of half interest in the family home – Variation of statutory equal share rule – Whether section 7 factor exists to displace 50/50 presumption

JACKSON-HAISLEY, STEPHANE J

BACKGROUND

[1] This is a Claim by way of Fixed Date Claim Form made under the Property (Rights of Spouses) Act (hereinafter 'PROSA') by the Claimant against the Defendant for a declaration that he is entitled to a fifty percent (50%) legal and beneficial interest in all that parcel of land part of Angels Pen now called Angels Grove in the parish of Saint Catherine being the lot numbered Six Hundred and Thirty on the plan of Angels Pen now called Angels Grove aforesaid deposited in the Office of Titles on the 24th day of May, 2002 of the shape and dimensions

and butting as appears by the said plan and being part of the land comprised in Certificate of Title registered at Volume 1349 Folio 23 of the Register Book of Titles (hereinafter 'the matrimonial property').

[2] The Claimant filed an Affidavit in support of his Claim on the 20th day of November 2018 wherein he set out the factual and legal basis for the reliefs sought. The Defendant resisted the Claim and set out the basis for doing so in her Affidavit filed on the 20th day of February, 2019.

[3] The undisputed facts of the case are that the parties were married on the 27th day of July, 2007. Both parties had been previously married and they were both divorcees at the time of the marriage. The matrimonial home was acquired by the Defendant prior to the marriage and it is registered in her sole name. During their cohabitation, the property constituted their family home. The marriage foundered after almost nine (9) years and this resulted in the Defendant successfully petitioning the Court for the marriage to be dissolved. A decree absolute was granted in or about May 2018.

[4] These matters are essentially not in contention between the parties however, not unexpectedly due to the nature of these matters, there are several factual variances between the parties. I will highlight only those that shed light on the salient issues before the Court.

THE EVIDENCE

[5] The Claimant maintained that he started to live with the Defendant about three (3) of four (4) years before she purchased the matrimonial home. He averred in his Affidavit evidence that he has been living at the family home for about fourteen (14) years and had spent significant sums in its acquisition, improvement and upkeep.

[6] In cross-examination he indicated that he did work such as painting and tiling. He denied the contention of the Defendant that he was paid by her for all the work he did on the house. He however admitted that the property taxes were paid by the Defendant and that it was the Defendant who paid the mortgage. Under re-examination he however qualified the latter admission by indicating that although it was the Defendant that paid the mortgage he helped her with this and that they both contributed to the payment of the mortgage.

[7] The Defendant vigorously denied that she was living with the Claimant before they got married and insisted that they did not begin an intimate relationship until after the dissolution of her first marriage. She stated that she acquired the property through a Victoria Mutual Building Society (hereinafter 'VMBS') loan in 2004 whilst she was still married to her first husband. She later received an additional loan which she used to improve the property. She exhibited letters from VMBS to prove same. She unwaveringly asserted that she paid the Claimant for all the work he carried out on the property.

THE SUBMISSIONS

[8] I wish to commend both Counsel for lucid submissions as they greatly assisted in the resolution of this matter.

THE CLAIMANT'S SUBMISSIONS

[9] Learned Counsel for the Claimant Mr Ruel Woolcock submitted that there is nothing in the evidence to displace the 50/50 presumption pursuant to section 7 of PROSA. He submitted that the operation of section 7 requires an interested party to make an application to vary the presumption and that there is no application made by the Defendant for this presumption to be displaced. He further averred that even if factors exist to displace the presumption it would not

be proper for the Court to consider these factors outside of an application made by the Defendant. This was the main thrust of his submissions.

[10] Mr. Woolcock also indicated that the Claim is made pursuant to section 6 and 13 of the Property Rights of Spouses Act (PROSA). Learned Counsel maintained that there is no dispute that they are within the timeline stipulated by PROSA to make the Claim as the decree absolute was granted in May of 2018. He indicated that there is no dispute that the property in question is the family home. Learned Counsel submitted that although the matrimonial home was registered in the Defendant's sole name, it being the family home, there is a presumption in favour of it being shared equally. He cited paragraphs 31- 35 of **Denise Harriott-Simms v Leroy Simms** [2016] JMSC Civ 125 in support of this submission.

[11] He further outlined that even if there was an application by the Defendant to vary the half-share rule, the fact that the property was owned before the marriage does not automatically entitle the Court to declare that the Defendant should get more than fifty percent (50%) share in the property. He maintained that the parties are seemingly joined that the Claimant contributed to the development of the property and that the equal share rule applies.

THE DEFENDANT

[12] The submissions of the Defendant were brief and direct. Learned Counsel for the Defendant Mr. Fabian Campbell indicated that section 7 is rebutted by section 6 of PROSA and even if there is no application, the Court must do what is fair. He highlighted paragraph 12 of the Defendant's Affidavit wherein she stated that: -

> *"I do verily believe that I would not be fair and reasonable for this Honourable Court to grant the Order in terms of the Fixed Date Claim Form Herein."*

[13] In asking the Court to do what is fair, Mr. Campbell highlighted factors to take into consideration such as the fact that the Defendant is still maintaining the

Claimant in that he is still living at the matrimonial home and she is still paying the property taxes and water rates and also, that the matrimonial home was already owned by the Defendant.

[14] Mr. Campbell indicated that section 7 gives the Court the power to vary the equal share rule even if there is no application as the Court cannot stand by and make unfair orders.

ISSUES

[15] The prominent issue for the Court to determine is Whether the Court can invoke the power to vary the equal share rule in the absence of an application being made by the Defendant?

[16] If the answer to this question is in the negative, then I need not go on to consider whether there are circumstances in this matter to justify the variation of the 50/50 presumption? / Whether the equal share rule should be varied in respect of the family home?

LAW AND ANALYSIS

[17] The law dealing with division of matrimonial property has been thoroughly dealt with by the Courts. I will commence by referring to the useful dictum of the Honourable Miss Justice Carol Edwards in the case of **Margaret Gardner v Rivington Gardner** [2012] JMSC Civ. 54. At paragraphs 14 and 15 she stated as follows: -

> ***"****PROSA is the relevant statutory regime which deals with claims for the division of matrimonial property on separation or divorce. PROSA gives this court jurisdiction to deal with claims involving the respective interest of spouses in both marital and common law unions. Section 6 PROSA provides in part that:*

> *6.-(1) Subject to subsection (2) of this section and sections 7 and 10, each spouse shall be entitled to one-half share of the family home-*
>
> *(a) On the grant of a decree of dissolution of marriage or the termination of cohabitation;*
>
> *(b) On the grant of a decree of nullity of marriage;*
>
> *(c) Where a husband and wife have separated and there is no likelihood of reconciliation;*
>
> *(2) ….*
>
> ***Section 6 requires the court to make a determination firstly, whether the property in question was indeed the family home. Upon that question being answered in the affirmative, each spouse, subject to the named sections, would be entitled, by virtue of the section, to a half share of the beneficial interest in the family home."*** *[my emphasis]*

[18] There is no dispute that the matrimonial property was in fact the family home as defined by section 2 of the Act. It was used habitually by both spouses and therefore, both spouses are presumptively, statutorily entitled to an equal interest in the property. It is also not in dispute that the Claim was brought within the twelve months of the grant of a decree of dissolution of marriage which is the precipitating event herein.

[19] Essentially the question that must be determined is whether there are circumstances that exist for the Court to invoke its powers under section 7 of PROSA and vary the Claimant's half-share entitlement provided for in section 6. Before I do so, I must address the overarching issue so stoutly proffered by Learned Counsel for the Claimant and that is, whether the Court can consider a variation of the equality rule under section 7 if no application to do so was made by the interested party, in this case, the Defendant.

[20] In considering this issue, I am guided by the principles laid down by the Honourable Mrs. Justice Marva McDonald Bishop, acting (as she then was) in the case of **Donna Marie Graham v Hugh Anthony Graham** (unreported), Supreme Court of Jamaica, Claim No. 2006 HCV 03158, judgment delivered on the 8th day of April 2008. At paragraphs 20 to 21 she stated: -

"Mr, Steer has submitted that section 7 should not be invoked to vary the rule as there is no application from any interested party as provided for in the section. In looking at this objection, I have noticed that the claimant has claimed 50% in both Durie Drive and Murray Drive and this was duly served on the defendant. The Defendant in his Acknowledgement of Service of Claim Form, filed in the matter, indicated that he intended to defend that claim and that he admitted no part of the claim. He later filed an affidavit in response in which he sets out, among other things, that Durie Drive was not acquired to be the matrimonial home. He then states:

> *"[34]. [T]hat in all the circumstances we humbly pray that this Honourable Court will declare Murray Drive to be the matrimonial home for the purpose of the operations of the Property (Rights of Spouses) Act and make such orders as it deems fit and just."*

There is thus an express application by the defendant that the half share rule be applied to Murray Drive. I find implicit in this is an application that the rule not be applied to Durie Drive and that in respect of the claim and the matters stated by the defendant in response to it, an order should be made in all the circumstances that would be fit and just.

At the beginning of the trial, the defendant conceded to Duire Drive being the family home but he expressly continued to deny a 50/50 apportionment in keeping with his statement of case. ***There is no formal written application by the defendant saying in exact terms that he is applying for the court not to grant 50/50 pursuant to section 7 of the Act in respect of Durie Drive. That, however, is a matter of form. The substance of his response to the claimant's case amounts to an application for the court not to apply the equal share rule in respect of Durie Drive and for the court to make an order in the circumstances that is 'fit and just'. This, in my view, is tantamount to him asking the court to vary the equal share rule within the provisions of section 7****." [my emphasis]*

[21] This principle was later endorsed by Brooks JA in the case **Carole Stewart v Lauriston Stewart** [2013] JMCA Civ 47 where he said at paragraph 46: -

Similarly, as was carefully explained by McDonald Bishop J in paragraphs 20-24 of ***Graham v Graham****, there is no necessity for a party, who is seeking, by virtue of section 7, to dispute the application of the equal share rule, to proceed by way of a formal notice of application for court orders. In assessing the complaint in that case, that there was no formal application in place, the learned judge noted that in the Acknowledgement of Service of the Claim Form, the defendant, Mr Graham, had stated that he did not admit any part of the claim and that he intended to oppose it. She went on to say at paragraph 21 of her judgment:*

> *"…There is no formal written application by the defendant saying in exact terms that he is applying for the court not to grant 50/50 pursuant to section 7 of the Act in respect of [the disputed property]. That, however, is a matter of form. The substance of his response to the claimant's case amounts to an application for the court not to apply the equal share rule in respect of [that property] and for the court to make an order in the circumstances that is 'fit and just'. This, in my view, is tantamount to him*

> *asking the court to vary the equal share rule within the provisions of section 7."*
>
> *In applications under both section 7 and section 13, what is required is that the documents, as filed, make clear to the court and to the respondent, the relief that the applicant seeks. The learned judge pointed out in* ***Graham v Graham*** *that the claimant in that case would have had ample notice from the defendant's affidavit that he was applying for a variation of the equal share rule. She is correct in her assessment that his application was one in substance, if not in form."*

[22] This principle was further bolstered in the case of **Fay Veronica Wint-Smith v Donald Anthony Smith** [2018] JMSC Civ. 62 where the Honourable Mrs. Andrea Pettigrew-Collins, acting (as she then was) stated at paragraph 26: -

> *In giving consideration to the claimant's submission that there is no application before the court for a variation of the equal share rule, I am mindful of the guidance of McDonald Bishop J (as she then was) in* ***Graham v Graham*** *which was cited by the claimant' Attorney-at-Law. McDonald Bishop J took the view that an express request to grant an order other than one giving effect to the equal share rule is sufficient to ground an application to vary the rule. I disagree with the claimant's contention that there is nothing in the pleadings from which the application may be inferred. Counsel cited the statement "that I humbly pray that this honourable court will deny the claimant's claim" which is contained in one of the defendant's affidavits and took the view that this statement was insufficient to ground the application. This statement in my view represents a request that the court should among other things not grant the claimant's request for a 50% interest in the matrimonial home. This is one of the declarations expressly sought by the claimant in her FDCF. Therefore any prayer that the court should deny the claimant's claim must be construed as referring to the claim in its entirety or any part of it.*
>
> *…Those questions and responses clearly indicate that the defendant was asking the court to vary the equal share rule. A request for a variation from a presumed 50% entitlement to 0% entitlement is a request for a variation.*

[23] Considering the authorities cited above, the law relating to this issue is very clear. There is no necessity for a party who is seeking relief by virtue of section 7 to vary the equal share rule to proceed by way of formal Notice of Application for Court Orders. I disagree with Learned Counsel for the Claimant that there was no application made by the Defendant to vary the equal share rule. I find implicit in her Affidavit, in particular paragraph 12, that she was requesting a variation of the rule and requested the Court to apply fairness which is a pertinent consideration under section 7. Also, in the Acknowledgment of Service Form, the Defendant had indicated that she intends to defend the Claim and she outlined in

her Affidavit and viva voche evidence reasons why the 50/50 presumption should not be applied. I therefore find that the Defendant, in substance, made an application for the variation of the equal share rule.

[24] Having made that finding I now turn to the question of Whether the equal share rule should be varied in respect of the family home and whether there exist any other relevant factors which the Court could consider in the Claimant's favour. In determining this issue, in the light of the factual divergence between the parties and the lack of independent evidence, much will turn on the issue of credibility.

[25] Section 7(1) of PROSA states: -

> *"Where in the circumstances of any particular case the court is of the opinion that it would be unreasonable or unjust for each spouse to be entitled to one-half the family home, the Court may, upon application of an interested party, make such order as it thinks reasonable taking into consideration such factors as the court thinks relevant including the following-*
>
> *(a) The family home was inherited by one spouse;*
>
> *(b) The family home was already owned by one spouse at the time of the marriage or the beginning of cohabitation;*
>
> *(c) That the marriage is of short duration."*

[26] The authorities have made it clear that the equal share rule should not be lightly varied. In the case of **Carole Stewart v Lauriston Stewart** (supra) paragraphs 50 and 51 of the judgment, Brooks JA said: -

> *"Based on the analysis of the sections of the Act, it may fairly be said that the intention of the legislature, in sections 6 and 7, was to place the previous presumption of equal shares in the case of the family home on a firmer footing, that is beyond the ordinary imponderables of the trial process. The court should not embark on an exercise to consider the displacement of the statutory rule unless it is satisfied that a section 7 factor exists.*
>
> *If a section 7 factor is credibly sown to exist, a court considering the issue of whether the statutory rule should be displaced, should none the less, be very reluctant to depart from that rule. The court should bear in mind all the principles behind the creation of the statutory rule, including, the fact that marriage is a partnership in which the parties commit themselves to sharing their lives on a basis of mutual trust in the expectation that their relationship will endure (the principles mentioned in **Graham v Graham** and **Jones v Kernott** mentioned above). Before the court makes any orders that displace the equal entitlement*

> *rule, it should be careful to be satisfied that an application of that rule would be unjust or unreasonable."*

[27] At paragraph 25 McDonald Bishop J (as she then was) in **Donna Marie Graham v Hugh Anthony Graham** (supra) examined who bears the burden of proof in variation applications. She stated: -

> *"The equal share rule stands in aid of the claimant. The law allows for an exception to its application, where in the court's opinion, the circumstances would be unjust or unreasonable to apply it. The rule can be displaced. This has formal implications for the burden of proof. The defendant has asserted in the circumstances in this case are such that would warrant an exception to the rule. He asserts it, he must prove it. He must bring himself within the exception. The burden of proof, is therefore, on the defendant to place himself outside the application of the rule that stands in aid of the claimant."*

[28] The Defendant in this case has to therefore, now prove that a section 7 factor exists and that the rule ought to be displaced. The Defendant bears a burden of proof on a balance of probabilities to show that it would be unjust and unreasonable to apply the equal share rule. In the case of **Carole Stewart v Lauriston Stewart** (supra) paragraphs 31, 32 and 34 of the judgment, Brooks JA said: -

> *"If the door is opened, by the existence of a s. 7 factor, for the consideration of displacement of the statutory rule, then very cogent evidence would be required to satisfy the court that the rule should be displaced.*
>
> *Another aspect of s. 7, which requires closer examination, is the question of the other factors that the court may consider in deciding whether the statutory rule has been displaced. It must first be noted that the three factors listed in s. 7(1) are not conjunctive, that is, any one of them, if shown to exist, may allow the court to depart from the equal share rule. Secondly, there does not seem to be a common theme in those three factors by which it could be said that only factors along that theme may be considered.*
>
> *The existence of one of those factors listed in s. 7 does not lead automatically to the entire interest being allocated to one or other of the spouses. What may be gleaned from the section is that each of these three factors provides a gateway whereby the court may consider other elements of the relationship between the spouses in order to decide whether to adjust the equal share rule. It is at the stage of assessing one or other of those factors, but not otherwise, that matters such as the level of contribution by each party to the matrimonial home, their respective ages, behaviour, and other property holdings become relevant for consideration."*

[29] I have given careful consideration to these principles and I have considered the totality of the evidence. It is not in dispute that the matrimonial property was

owned by the Defendant prior to the marriage without the assistance of the Claimant. This of course is one of the grounds upon which the Court is empowered to consider the variation of the equal share rule. I am therefore satisfied that a section 7 factor exists, that is, that the family home was already owned by the Defendant at the beginning of cohabitation.

[30] At paragraph 35 of **Denise Harriott-Simms v Lenroy Simms** (supra), the Honourable Mr. Justice Kirk Anderson stated: -

> *"… when a s. 7 factor is found to exist, that the court will then go on to examine other elements such as contribution and others, in an effort to ascertain whether it is unreasonable or unjust for each spouse to be entitled to one-half share of the family home and adjust the statutory rule accordingly."*

[31] His lordship continued at paragraph 36: -

> *"… Contribution in and of itself is not a s. 7 factor, it is one of the elements to be considered after a s. 7 factor is found to be extant."*

[32] In considering the factor of contribution, I accept that it is the Defendant who acquired the property through a mortgage and that she acquired an additional mortgage that was used to improve the property. I also accept her evidence that she solely repaid the mortgages. However, I reject her evidence that she paid the Claimant for his construction work that was done to improve the property. I believe that his contribution towards the construction and improvements of the property was done in furtherance of his role in the union. Whilst I accept that he made contributions, in my view, there is nothing of substance which the Claimant has provided that can overwhelm the contentions of the Defendant.

[33] The Claimant has only suggested that he used to assist with mortgage payments. I do not believe him in that regard. He did not produce any evidence, documentary or otherwise of the quantum of his contribution or anything to prove the veracity of this allegation. Even if I accept that he made modicum contributions, the evidence is striking that it is the Defendant who discharged the majority of these mortgages.

[34] Also, I am persuaded by the fact that since the breakdown of the relationship, it is the Claimant alone who has benefited from the use and enjoyment of the property as he lives there whilst the Defendant had to find other accommodation in an effort to preserve her safety. Despite the fact that it is the Claimant alone who continued to live at the property the Defendant has continued to pay the water and property taxes.

[35] For these reasons, I concur with the reasoning of my Brother the Honourable Mr Justice Bertram Morrison at paragraph 53 of the case of **Mary Maud Taylor v Mike Alphanso Taylor** [2015] JMSC Civ. 121 where he stated: -

> *"… while I do not dissent from the 'posture of reluctance', I am of the view that it would be unjust and unreasonable should I not accede to a variation of the equal share rule."*

[36] In that case, Morrison J felt obliged to vary the equal share rule after the evidence revealed that the Defendant's input in acquiring and expanding the property was greater than that of the Claimant. The contributions included the $70,000.00 deposit paid by the Defendant; the $800,000.00 loan from the National Housing Trust; the mortgage payments from 1998 to the time of the hearing; a loan of $70,000.00 from the Insurance Employees Co-operative Credit Union to purchase materials for the expansion of the Studio Apartment; two loans from a Mr Sonny Gobin totalling $55,000.00; a "partner draw" of $100,000.00 and, donations of fixture from co-workers at Key Insurance Company Limited. The Claimant on the other hand contributed to the building of a downstairs bedroom.

[37] I am of the view that it would be unjust and unreasonable should I not accede to a variation of the equal share rule based on the factors outlined above. Accordingly, I will award the Claimant a thirty percent (30%) share in the family home.

ORDERS

1. A declaration that the Claimant is entitled to thirty percent (30%) of the legal and beneficial interest in all that parcel of land part of Angels Pen now called Angels Grove in the parish of Saint Catherine being the lot numbered Six Hundred and Thirty on the plan of Angels Pen now called Angels Grove aforesaid deposited in the Office of Titles on the 24th day of May, 2002 of the shape and dimensions and butting as appears by the said plan and being part of the land comprised in Certificate of Title registered at Volume 1349 Folio 23 of the Register Book of Titles;

2. Subject to any existing mortgages, the Registrar of Titles is hereby directed pursuant to section 158 (2)(a) of the Registration of Tiles Act to cancel Certificate of Title Registered Certificate of Title registered at Volume 1349 Folio 23 of the Register Book of Titles and issue a new Certificate of Title in duplicate in the names of the Claimant and the Defendant as tenants-in-common in the share specified above;

3. The transfer of the Claimant's name on the new Certificate of Title consequent on this order is exempt from transfer tax pursuant to section 9 of the Property (Rights of Spouses) Act;

4. Each party shall bear their own costs;

5. Claimant's Attorney-at-Law to prepare, file and serve this Order.